Supreme Court U.S.
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No. 02-763

IN THE

Supreme Court of the United States

JOANNE B. BARNHART,
Commissioner of Social Security,

Petitioner,

v.

PAULINE THOMAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

The question presented by the Petitioner is whether the identical statutes at 42 U.S.C. § 423(d)(1)(A) and 42 U.S.C. § 1382(c)(a)(3)(A) can be interpreted by the Commissioner's regulations to allow for the denial of a disability application by finding that the claimant has the physical and mental capability to perform past relevant work without allowing for the introduction of evidence by the claimant that past work no longer exists in substantial numbers in the economy. For a variety of reasons which will be discussed below, Petitioner argues that her regulation at 20 C.F.R. § 404.1520(e) allows for the interpretation of the statute to have the practical effect of denying disability to a claimant who is found capable of performing past relevant work even if it can be shown that such work has disappeared from the economy. The United States Court of Appeals for the Third Circuit considered such a reading to be incongruous with the plain meaning of the statute, terming the result of the Commissioner's interpretation to be "nonsensical" and therefore outside any possible, reasonable intent of the Congress. The Petition for Certiorari seeks review of the Third Circuit's decision and thus submits that the opinion constitutes a radical departure from the broad authority conferred by Congress on the Commissioner of Social Security for the interpretation of the Social Security Act. Yet the Court's decision does not impair the Commissioner's ability to make regulations nor does it invalidate the regulation under discussion in the instant case. Rather, the Court's decision merely negates the Commissioner's mechanical reading of her own regulation which would necessarily lead to an absurd result not contemplated by the intent of the statute. The Petitioner seeks relief which would have this Court necessarily disrupt the rational basis and social utility of the Social Security Act

and regulations without offering a compelling or even reasonable justification for the inevitably eccentric result of such a disruption. The Petitioner prays for validation of the Commissioner's rigid interpretation in a vacuum of unreality. Thus, Petitioner argues that it is well within her Congressionally recognized "broad authority" to deny disability by returning Respondent to the work-place to perform a job which no longer exists. Petitioner claims Congressional authority to draw up regulations and interpret those regulations wherein a disability applicant is precluded from proffering evidence showing that her former employment is no longer relevant in the national economy. Petitioner's peculiar construction would render such evidence immaterial to the issue of disability. Petitioner would have this Court affix its imprimatur to an academic construction in which the issue of disability is divorced from factual circumstances or empirical reality. Yet, the Petition evokes no convincing theory, compelling regulatory prerogative or concrete practical necessity for separating the law from the people it is intended to serve except to point this Court's attention to other Circuits which, under differing factual circumstances, allowed deference for administrative authority to overwhelm reason and bypass reality. The Third Circuit's decision injures no party, causes no disruption, adds no burden, transfers no authority, fosters no new initiative, harms no important governmental prerogative and limits no administrative authority. Instead, it restores credibility to the Commissioner's programmatic integrity by replacing tortured construction with plain english usage, by preferring common sense to insensitive convention and by recalling the Commissioner's traditional attitude towards past *relevant* work by insisting that what is no longer relevant cannot be resurrected as a bureaucratic means to a nonsensical administrative result.

I. THE COURT OF APPEALS' DECISION IS FAITHFUL TO THE PLAIN, LOGICAL, GRAMMATICAL READING OF THE STATUTE WHEN CONSIDERED IN CONJUNCTION WITH THE COMMISSIONER'S REGULATORY LANGUAGE

The Court's reading of 42 U.S.C. § 423(d)(2)(A) stands for the limited proposition that when the statute refers to "work", it quite naturally refers to jobs existing in the United States at the present time. If a social security applicant retains the physical and mental capability to perform a job existing in substantial numbers in the national economy at the present time, that applicant cannot be found disabled. The Court's decision does not change that statutory intent. But if a job no longer exists in substantial numbers in the national economy, the theoretical ability of an applicant to perform its required tasks can have no material impact on the issue of the applicant's ability to work in our economy. This is the plain meaning of the statute and this is the Third Circuit's reading of that statute.

The Commissioner's interpretation of that statute likewise defines work as an identifiable job existing in the current economy at the present time *unless* the work was previously performed by the applicant. According to the Commissioner, such work need not exist in the national economy at the present time so long as the applicant has the capacity to perform it. If the medical evidence of record allows the disability claimant to perform past work, disability must be denied irrespective of whether such work presently exists. It is respectfully submitted that nothing in the wording of the statute allows for such a strange outcome. No rational reason exists for denying disability solely by demonstrating a theoretical capacity to perform an extinct vocation.

No rationale is offered for such a construction. Even the Commissioner's regulation itself fails to compel such a result:

> Your impairments must prevent you from doing past relevant work. If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment, we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this type of work, we will find that you are not disabled (20 C.F.R. § 404.1520(e)).

The Petitioner points to the last sentence in this regulation, insisting that the regulation refers solely to the ability to "do this kind of work". But the Court's attention is respectfully directed to the first sentence of the regulation wherein it insists that "your impairment must prevent you from *doing* past *relevant* work". Aside from the fact that one cannot *do* a job which no longer needs doing, the Commissioner further defines past work as necessarily being *relevant*. Disability claimants are not denied benefits for the ability to perform *past work*. Those benefits are denied to persons demonstrating the ability to perform *past relevant work*. According to the Commissioner's regulations at 20 C.F.R. § 404.1565(a):

> We consider that your work experience applies when it was done within the last 15 years, lasted long enough for you to learn to do it and was substantial gainful activity. We do not usually consider that work you did 15 years or more before the time we are deciding whether you are disabled (or when the disability insured status requirement was last met, if earlier) applies. A gradual change occurs in most jobs so that after 15 years it is no longer realistic to expect that skills and abilities required in a job done then continue to apply. The 15 year guide is intended to insure that remote work experience is not currently applied.

Clearly, the Commissioner's regulations always regard past work as necessarily contemplating relevance. Thus, the "15 year rule" defines it's own purpose as insuring "that remote work experience is not currently applied". The regulations carefully protect the integrity of the process by anticipating situations where changes in the work-place render a claimant's past ability to perform a certain job of little value in determining the ability to resume that job 15 years thereafter. Likewise, the Commissioner's Social Security Rulings seem to assume that a past job must still exist in order to formulate the basis for a denial. Although the rulings don't explicitly articulate such an assumption, they do require a three-pronged test for the assessment of past relevant work. First, the Commissioner requires that the past work be substantial gainful activity. Second, a durational requirement insures that the applicant worked in the past job long enough to develop the facility needed to accomplish the tasks involved. Lastly, there is a "recency" requirement. This factor reflects the Commissioner's actual policy statement regarding past relevant work and states that:

> Recency refers to the time which has lapsed since the work was performed. A gradual change occurs in most jobs in our national economy so that after 15 years it is no longer realistic to expect that skills (or proficiencies) and abilities acquired in these jobs continue to apply. The 15 year guide is intended to insure that *remote work experience which could not reasonably be expected to be of*

current relevance is not applied (SSR 82-62, Wests Social Security Reporting Service, Rulings 1975-1982, page 809-810).

Here, the Commissioner's explanatory rulings assume that work experience "which could not reasonably be expected to be of current relevance" cannot be utilized in a finding that an applicant can perform past relevant work. Thus, the regulation at 20 C.F.R. § 404.1565(a) and the Commissioner's explanatory policy statement at SSR 82-62 both stand for the rational proposition that denying disability for the ability to perform past relevant work must be predicated on the fundamental pre-requisite that such a job is available and in existence somewhere in the national economy. To rule otherwise, as the thrust of Petitioner's argument suggests herein, would strike at the very heart, meaning and purpose of the Social Security Act. The disability system is designed to respond to social reality with a utilitarian approach to establishing disability within the context of economic and vocational realities. Petitioner's reading of the statute at 42 U.S.C. § 423(d)(2)(A) for the purposes of the facts contemplated in this case, consigns the disability system to the realm of theory and establishes practices based entirely on academic speculation. While the "15 year rule" utilizes an arbitrary span of time within which it is administratively assumed that jobs change dramatically so that they bear little semblance to their original form, the Commissioner's own principle of relevance underlying the rule renders Petitioner's current statutory construction all the more difficult to understand. The Social Security Administration has always maintained that a claimant must be unable to *do* past *relevant* work. Here, respondent can't *do* her former job because that job is no longer being *done* anywhere and the Court's decision utilizes the

Commissioner's own regulatory wording to define a job not being *done* anywhere as no longer meeting the *relevancy* requirement of the Commissioner's inspired definition of past *relevant* work.

II. THE OPINION OF THE COURT OF APPEALS OFFERS THE SOLE REASONED, DEFENSIBLE READING OF THE STATUTE

The Petition takes issue with the Third Circuit's grammatical construction of the statute, invokes what it calls a "cardinal principal of statutory construction", raises the spectre of more absurd results in the face of the new precedent and warns of what it calls "significant programmatic implications" for future disability adjudications. Each of these four arguments can be shown to be entirely without merit and none of these issues justify intervention by this Court.

A. The Court's Grammatical Construction Of The Statute Highlights Its Plain Meaning

First, the Petition takes issue with the seemingly unassailable grammatical certainty that the statutory usage of the phrase "engage in any other kind of substantial gainful work which exists in the national economy" must, through it's usage of the term "any other work", revert to the previous mention of the word "work" in the term "unable to do his previous work". Thus, just as "*any other work*" must exist in substantial numbers in the economy so too must "*previous work*". It is respectfully submitted that no other construction is sensible. The Third Circuit took great pains to illustrate the indispensability of such a construction with its analogies

to the tiger and the novels of Charles Dickens (Petitioner's appendix 8a). Petitioner counters this seemingly rational usage of the English language with a tortured construction offering the proposition that the statute in actuality was drafted to utilize the term "any other work" to indicate the mirror opposite meaning of the word "work" referred to in the previous phrase. Thus, Petitioner would have it that the statute be read as if to mean "not only have I not read Oliver Twist, but I have not read any other Victorian novels *which were published after Oliver Twist*" (Petitioner's brief 23). Even in the unlikely event that such a construction were grammatically possible, Petitioner's brief does not answer the bedrock question which was asked in the Third Circuit's opinion and repeatedly posed by the Court during oral argument before the Court's three member panel and again before the *en banc* assemblage: What would be the Congressional intent and legal purpose of insisting on such a distinction? Petitioner's brief seems to suggest that its odd deconstruction of the statutory phrase "any other work" was specifically placed in the statute by Congress to authorize the result that past relevant work needed not continue to exist in the national economy in order to serve as a disqualifier for disability. It is respectfully submitted that no good reason has been offered by the Petition or by the dissent for such an odd distinction. It frankly cannot be imagined that Congress drafted these words in this way in order to make it clear that "any other work" refers to a different *kind* of work or that it was the general consensus of the members of Congress to deny disability to those applicants who can physically perform past work even if past work had disappeared from the national economy. Indeed, if Congress specifically intended such a result what legal justification did the Commissioner rely upon to insist on *relevance* or to draft its

"15 year rule"? Thus, the Petition's grammatical argument would seem to fail on two counts, poor grammar and unfathomable Congressional intent.

B. The Court's Statutory Construction Preserves The Legislative Distinction Between Past Work And Other Types Of Work

A second theory offered by Petitioner would have this Court believe that the Third Circuit's construction of the statute fails to respect a principal of statutory construction because it would blur the distinction between "previous work" and "any other kind of substantial gainful work which exists in the national economy". Thus, it is suggested that the Third Circuit's reading of the statute offers no legal distinction between 'prior work' at step four of the sequential evaluation and "any other kind of work" at step five of the sequential evaluation because, under the Court's reading, both types of work would necessarily have to exist in the national economy. It is therefore maintained that if this Court reads the statute as it is grammatically constructed and as it is interpreted by the Third Circuit, there would exist no legal difference between steps four and five. This argument cannot be taken seriously by anyone familiar with social security law and the Commissioner's sequential evaluation or by anyone who reads the statute in plain English. The difference between the fourth step of the sequential evaluation which decides whether an applicant's residual functional capacity is compatible with "past relevant work" and the fifth step of the sequential evaluation in which the Commissioner is saddled with the burden of showing whether that capacity can accommodate "any other kind of work" has nothing to do with the existence of those jobs and everything to do with vocational profile necessary to perform those jobs. At the

fifth step, an applicant's age, education and exertional and skill levels of prior work activity are designated as vocational factors mandated for consideration. These factors are left unmentioned at the fourth step of the sequential evaluation since persons who previously performed a certain job are obviously possessive of the educational and vocational pre-requisites to hold and perform such a job. It is only at the fifth step when the Commissioner is burdened with identifying a new job, not previously held by the applicant, that these factors become factors. This is, of course, the plain meaning of the statute and the only reasonable difference between past work and any other work. Thus, the statute clearly demarcates that disability is available only to an applicant who is:

> Not only unable to do his previous work (fourth step) but cannot, *considering his age, education and work experience engage in any other kind of substantial gainful work which exists in the national economy* (fifth step).

Petitioner's "cardinal principal of statutory construction" argument would have this Court conclude that if the Third Circuit's insistence that both "previous work" at the fourth step of the sequential evaluation and "any other kind of substantial gainful activity" at the fifth step of the sequential evaluation both have to exist in the national economy, there would not be any legal difference in the adjudicative criteria between work at the fourth step and work at the fifth step. This argument is rendered utterly without merit by a simple reading of the statute and a rudimentary knowledge of the Commissioner's regulatory construction of the sequential evaluation. The Petition would have this Court arrive at the untenable conclusion that the difference between prior work

and any other work takes the form of the irrational, unexplainable condition that one must exist in the national economy and one need not exist at all. But in actuality, the statute merely mirrors empirical reality. If a person once held a job, she was obviously *qualified* to perform it then and she is *qualified* to perform it now if the medical evidence yields a functional basis of physical and mental capability to satisfy the demands of past work and that work is still being done in the national economy. If one is to be assigned a new job, their resume and the inventory of their educational qualifications strength and skill abilities and prior vocational experiences now become factors for investigation.

C. The Court's Statutory Construction Avoids The Absurd Result Suggested In This Case By The Commissioner's Interpretation

A third argument made by the Petition comes in the form of a counter-argument. Whereas the Third Circuit pointed to the obvious circumstances of this case where the Commissioner's regulatory construction of the statute would lead to absurd results of sending an applicant back in time to resume a job no longer available in the economy, the Petition suggests that an equally absurd result would ensue if the Court's construction were adopted. Thus the Petition makes reference to odd and unique scenarios wherein it is possible that under the Court's holding an individual would be given the legally protected option to quit her job and collect disability merely because that person held an unusual or uncommon job which never existed "in substantial numbers in the national economy". Yet, the "absurd" potential portrayed by this peculiar hypothetical scenario is neither absurd nor unprecedented. It now exists. Prior to the Third

Circuit's decision, the Social Security Regulations permitted individuals to quit their jobs and collect disability under less unlikely circumstances not because of any wayward statutory construction but rather due to the Commissioner's own regulations. It is the five step sequential evaluation set forth at 20 C.F.R. § 404.1520 which affords such rare but realistic options to a myriad of individuals under certain circumstances. Thus, while Petitioner argues that:

> Indeed the Court's holding would permit such an individual to quit her job and collect disability benefits instead even though the individual's employer wanted her to return - if that job did not exist "in significant numbers either in the region where such individual lives or several regions of the Country" (Petitioner's brief page 25),

that same scenario existed prior to the Third Circuit's decision at the third step of the sequential evaluation. As is generally known, the first two steps of the sequential evaluation are perfunctory threshold stages requiring a person claiming disability: (1) not be working; and (2) suffering some verifiable medical or emotional condition which affects the ability to perform certain work related functions. At the third step of the Commissioner's sequential evaluation, a claimant can be found presumptively disabled by manifesting a medical condition equivalent in severity to the Commissioner's "Listing of Impairments" at 20 C.F.R. Appendix 1. Because the inquiry into presumptive medical disability occurs by the Commissioner's own preferred method of analysis at the third step of the sequential evaluation, it necessarily precedes the fourth step which examines ability to perform past relevant work. It can be conservatively estimated that there are literally hundreds

of thousands if not millions of workers in the American economy today who are presumptively disabled at step three of the sequential evaluation but nevertheless choose to work rather than collect disability benefits. It does not require actuarial data or scientific research for this Court to realize the significant numbers of plucky, self-reliant persons confined to wheel chairs, visually handicapped or totally blind individuals and many other physically challenged persons requiring hemodialysis treatments, or suffering severe heart conditions, those who are profoundly deaf, or undergoing chemotherapy or suffering from crippling arthritis, lupus, anemia or emphysema, most of whose medical diseases qualify as conditions equivalent to those listed by the Commissioner as authorizing presumptive disability. These people currently qualify for disability benefits yet they do not collect those benefits because, at the first step of the sequential evaluation, they are disqualified because they perform substantial gainful activity. Under the Commissioner's sequential evaluation, any and all of these disability qualified persons have been afforded the practical option, by the Commissioner's own regulations, to quit their jobs tomorrow morning and collect disability benefits. This option to quit working and receive disability benefits is not the absurd outcome of a misguided Court reading of a Congressional statute as is derisively suggested by Petitioner's argument. Rather, it is the direct result of the Commissioner's sequential evaluation which places presumptive disability under the Listing of Impairments prior to an inquiry regarding past relevant work. Again, while no concrete numbers are available to this Respondent, this Court can safely assume that there are millions more presumptively disabled people choosing to work than there would be persons with "unusual or uncommon" jobs who could take advantage of this newly discovered loop-hole ingeniously detected in

the Petitioner's analysis of the Third Circuit's grammatical construction of the statute. The ever vigilant Commissioner suspects that persons who can work would take advantage of the disability system to stop working in this unique circumstance. The Respondent respectfully dismisses these suspicions by tipping her cap in the direction of the millions of people who could instantly qualify for disability but opt for the enhanced lifestyle and rewarding financial and social independence of going to work on a daily basis notwithstanding the Commissioner's offer of a Social Security check.

D. The Court's Decision Does Not Affect The Disability Requirements Of The System

Petitioner's next argument maintains that the Third Circuit's decision would unintentionally degenerate the disability program into a type of unemployment system which was clearly not the intent of Congress. While it is conceded that disability benefits must be granted to only those demonstrating a physical or mental impairment which interferes with the ability to perform certain work related functions, it is difficult to appreciate how the Third Circuit's decision nullifies or even modifies this concept. The Court is respectfully reminded that the potential controversy placed before it represents differing interpretations of the statutory basis underlying the fourth step in the Commissioner's sequential evaluation. In order to reach that fourth step, it is necessary for the social security disability claimant to prove, to the satisfaction of the Commissioner's adjudicator at the second step, that she suffers from a severe impairment which limits her ability to perform basic work related functions. Only after such proofs have been accepted does the sequential evaluation eventually reach the fourth step which investigates

the issue of whether a claimant's reduced residual functional capacity is compatible with the demands contemplated in the resumption of past relevant work. The Third Circuit's decision does nothing to disturb the nature of the system or the Congressional intent that disability be awarded "by reason of a physical or mental impairment". The Commissioner's judicially sanctioned, well thought-out, sequential process insures that the disability program remains anchored to the absolute necessity of proving physical and/or mental infirmities which compromise physical abilities or mental faculties necessary to perform the tasks contemplated in full time, sustainable employment. The Petitioner's arguments were previously voiced by the Commissioner during two oral arguments before the Third Circuit, raised again in the Court's dissent (Petitioner's appendix 18a) and deflected cogently in the Opinion (Petitioner's appendix 12a n.5). It is the Commissioner's adjudicators that decide whether a claimant manifests a severe medical or psychiatric impairment and it is these same adjudicators who calculate the effect of any severe impairment on the claimant's physical and mental abilities by announcing their assessment of that claimant's "residual functional capacity". Only after such calculations and estimates have been authorized by the Commissioner's tribunal and the impact of the claimant's infirmities are established that we reach step four and then five by translating what residual abilities were left the claimant by her infirmities into her potential in the job market. Thus the system is based first and foremost in the medical investigation and that investigation is left entirely in the hands of the Commissioner's people. It is therefore impossible for Respondent to understand where the Court's decision turns the disability system into an unemployment program or how that decision changes the fundamental insistence that verifiable illness serve as the basis for a disability determination.

E. Petitioner's Claims Of Dire Programmatic Chaos Resulting From The Third Circuit's Decision Are An Illusion

Lastly, the Petition warns of "significant programmatic implications" should this Court leave the Third Circuit's opinion undisturbed. Yet, it is difficult to appreciate the nature of such implications from the arguments presented. Here, the Petition picks up on The Honorable Judge Rendell's dissenting comment that the Third Circuit's decision would "wreck havoc with the evidentiary aspects of the Administrative process" (Petitioner's appendix 18a). But neither the Petition nor the dissent have appreciated the need to describe the nature of this "havoc" or how the Third Circuit's decision would "wreck" it. It is a well settled and universally accepted evidentiary reality that the burden of proof rests with the Social Security Disability claimant throughout the first four steps of the sequential evaluation. The instant case deals exclusively with the fourth step of that evaluation. The burden or proof therefore remains with the claimant for the purposes of the instant discussion. Nothing in the Third Circuit's decision remotely attempts to disturb such evidentiary expectations. At the administrative hearing the Administrative Law Judge rejected any consideration of an offer of proof that the claimant's past relevant work was no longer relevant because it no longer existed in substantial numbers in the national economy:

> In finding the claimant capable of engaging in her past relevant work as an elevator operator, the Administrative Law Judge has considered the argument of claimant's attorney that her past relevant work as an elevator operator (which

> is a light job) no longer exists in the national economy and therefore the vocational rules must be used. 20 C.F.R. §§ 404.1560(b) and 416.960(b) states that an individual will not be found disabled if she has the physical and mental capacity to meet the demands of her past relevant work. A close reading of this section of the regulations shows that no reference is made to whether or not the past relevant work must exist in significant numbers in the national economy. Even though SSR 82-40 is not strictly applicable to this case, the ruling emphasizes the proper test in the fourth step of the sequential evaluation process is whether the individual can do her previous work. If the claimant can meet the sitting, standing, walking, lifting, manipulative, intellectual, emotional and other physical and mental requirements of a past job she is capable of performing that job. It is only after that the claimant has proved that she cannot do her previous work that the burden shifts to the Commissioner and the vocational rules are applied (Petitioner's appendix 43-44a).

This ruling by the Administrative Law Judge is precisely in concert with the position of the Commissioner, the attitude of the dissent and the arguments of Petitioner. Yet it misrepresents the position of the Respondent and the decision of the Third Circuit. The claimant was not seeking to shift the burden of proof at the fourth step of the sequential evaluation. The claimant was attempting to offer proof that her past relevant work was no longer relevant because it no longer existed in the national economy. Only after *the claimant* offers evidence sufficient to establish such a

proposition to the satisfaction of the Commissioner's adjudicator can a finding be made that past relevant work is no longer relevant, moving the sequential evaluation to its final step. The issue before this Court is prompted by the decision of the Administrative Law Judge not to accept such proofs because of the Commissioner's attitude that even in the presence of compelling evidence sufficient to establish the obsolescence of claimant's past work, the Commissioner's current reading of the statute maintains such facts to be irrelevant. All the Third Circuit's decision seeks to accomplish is to allow *a claimant* to introduce evidence to defeat what undoubtedly was the Congressional and regulatory presumption that past work continues in existence, and upon acceptance of such proofs, move the sequential evaluation to its final, conclusive step. It is difficult to imagine more than a handful of such circumstances occurring in a given year. Thus, the idea that the Third Circuit's decision would "wreck havoc" with the Commissioner's orderly adjudication of the disability program is far-fetched to say the least and the Petition's suggestion that somehow the *Commissioner* would bear the burden of proving that past jobs exist in every single case is merely the product of Petitioner's fertile, foreboding imagination. What the Third Circuit decision does accomplish is the preservation of the programmatic integrity of the disability adjudication process. The decision stands for the unassailably reasonable proposition that disability cannot be denied a claimant by finding that the only job she is capable of performing has been relegated to the dust-bin of history. If, as both the Petitioner and the dissent maintain, past relevant work is meant not to designate a specific job but rather to stand as a metaphor for the ability to perform work, the Third Circuit decision stands for the reasonable obligation to identify such work at the fifth step of the sequential evaluation. Thus, in the rare instance where a type

of employment performed within the arbitrary 15 year window of presumed relevance is proven to have virtually disappeared from the national economy, the Third Circuit's decision removes the adjudicative process from the realm of bureaucratic theory and academic speculation and places it back where it belongs, in the realities of the American work-place. To do otherwise would be to "wreck havoc" with the confidence of the working citizenry, which funds the social security system with its payroll taxes, confident in the integrity of process. The Petitioner's unspecified "significant programmatic implications" notwithstanding it is difficult to appreciate the impact of such imagined implications in comparison with the real-life incredulity of Pauline Thomas and other similarly situated individuals as they are told by their Government that 36 years of FICA contributions do not qualify a worker for disability because of an ability to perform a job that had been technologically relegated to a museum curiosity. It is deflating to imagine a more "significant programmatic implication" than the realization by the working public that the administrators of their retirement and disability programs are so detached from vocational realities that disability can mechanically be denied on the basis of defunct employment opportunities. Yet this uninspiring prospect is further highlighted by the Petitioner's penultimate argument that:

> Given today's dynamic and technological economy the burden is likely to increase. Today, job types are becoming obsolete with increasing frequency just as new types of work increasingly emerge to replace them (Petitioner's brief page 29).

Verily, the Petitioner argues that since more and more jobs will become obsolete it is particularly important for this Court

to allow the Commissioner to maintain the fantasy that *ability negates disability* even if that ability pertains solely to the performance of a vocational anachronism. More sensible and more sensitive conclusions can be drawn. First, as the American economy is overtaken by technological advances and the work-place continues to shift from an industrial to a service economy, it stands to reason that fewer physical infirmities will result in an inability to perform past work. This inexorable shift from the plant to the office, from the mine to the computer lab, from the factory town to the financial district, is likely to reduce the burden on the Commissioner's disability system as those with physical disabilities rendering them incapable of heavy lifting or strenuous exertion will remain fully capable of resuming these less physically taxing fields of endeavor. Yet, to those with physical or mental infirmities who are nevertheless left behind by the technological obsolescence of their former jobs, the Commissioner's insistence on retaining those non-existent jobs in the calculus of its disability determination needlessly renders the adjudicative process itself obsolete. It cannot seriously be maintained that Congress intended a conscious detachment of the disability regulations from the vocational realities of the American economy especially in the face of "today's dynamic and technological economy" presciently predicted by Petitioner's pleading. Thus, the Third Circuit's exhaustively explained and cogently articulated reading of the statute in a manner designed to avoid the absurd results advocated by the Petitioner should be respected, if not applauded by this Court and weighed favorably over any real or imagined "programmatic implications" hinted at but never specified in the Petition.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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